89-1121

Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

December Term, 1989

JULIUS WEBB,

Petitioner,

against

MERCK & CO., INC., and
MERCK SHARPE & DOHME EMPLOYEE
ORGANIZATION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Cletus P. Lyman
LYMAN & ASH
Counsel for Petitioner
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Questions Presented

1. Does a union breach its duty of fair representation, where it pursues the grievance of a more senior member to a settlement which ousts the member the company selected from a job,

(a) in failing to provide the member originally selected with notice, representation or opportunity to be heard in the grievance proceedings and settlement?

(b) in authorizing arbitration of the senior members grievance without considering the comparative qualifications of the respective candidates, where the collective bargaining agreement makes seniority only one of the factors to be considered in the employment selection decision?

2. Where the trial judge uncritically adopts almost verbatim the entire proposed findings of fact and conclusions of law of one party prepared without judicial guidance, should Rule 52(a) insulate these findings.

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Petitioner Julius Webb, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on Septem-

ber 6, 1989 (timely petition for rehearing denied on October 13, 1989).

Opinion Below.

The Court of Appeals for the Third Circuit issued a judgment order without opinion or oral argument affirming the judgment of the district court (28a). The district court in an unpublished memorandum and judgment order, entered judgment against petitioner after bench trial (1a).

Jurisdiction.

The judgment order of the Court of Appeals was entered on September 11, 1989. A timely petition for rehearing was denied on October 13, 1989. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Rule Involved.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon,... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Statement of the Case.

This action is brought under the Labor Management relations Act ("LMRA"), 29 U.S.C., Section 185, et seq., granting jurisdiction for suits concerning

violations of labor contracts.

Petitioner Julius Webb ("Webb"), was employed in the mailroom at Merck & Co. ("Company"), and was a member of the respondent union ("Union"). He applied for a posted clerical position and was selected for the position by the Company. He worked for about four months in the new position when he was told by the Union vice president that the Company and Union had settled the grievance of a more senior member who had applied for the job by agreeing that he should have the position and that Webb would return to his former job in the mailroom.

The Union governing council authorized arbitration of the grievance, which was settled on the day of arbitration before the arbitration began. The Union and the Company did not discuss

the grievance with Webb or give him notice or opportunity to be heard in the grievance proceedings and settlement that ousted him from his job.

The contract promotion clause makes seniority only one of the factors to be considered in promotion decisions for the job at issue. It says:

> "(B) In the case of classifications above Labor Grade 10, . . . the employer will advance or promote employees in the Office-Clerical Unit on the basis of their qualifications for a given job. Such qualifications are defined as Union seniority, all elements of the job description, and all elements of the specification guide."

The Union officials involved in the grievance procedure and settlement admitted that they never made any comparative evaluation of the qualifications of Webb and the grievant and that they

knew almost nothing about Webb's qualifications for the position and that the Settlement Agreement ousting Webb from the job was entered into without any thought or representation being given to Webb.

Arbitration of a grievance required authorization by the 24-member Union governing council. The Union Secretary solicited this authorization by telephone. She knew nothing about Webb or his qualifications and believed the grievance did not involve his job. She recorded the results on an undated piece of paper: "14 to nothing, approved", without identifying the voters.

Webb brought suit under the Labor Management Relations Act seeking restoration of his job and damages. During trial preparation, Webb and the

Company reached a settlement where Webb was promoted to a management level job, not subject to Union jurisdiction. An amended complaint was served eliminating the Company as a defendant. The case continued seeking Webb's attorneys' fees on two theories: (1) that his attorneys' fees were made necessary by the Union's breach of duty of fair representation; and (2) under the common benefit theory, because his action would benefit all Union members by clarifying the Union's duty of fair representation when there was a grievance filed by one member about non-selection for a position the Company gave to another Union member.

Most of Webb's evidence at bench trial consisted of about 300 pages of deposition testimony of the Union officials involved in the grievance

proceedings and settlement. This testimony was admitted into evidence under Rule 32(a)(2), F. R. Civ. P.

In his memorandum and judgment order, after bench trial, the district judge adopted almost verbatim the entire proposed findings of fact and conclusions of law submitted by the Union. The district judge's memorandum and judgment order did not address the cases and arguments in Webb's 26-page trial memorandum and his 36-page reply trial memorandum.

The Union's proposed findings, adopted by the trial judge, did not make any reference to the about 300 pages of deposition testimony Webb introduced into evidence, which contained the admissions of the Union officials that they never compared the qualifications of Webb and

the grievant and never considered Webb during the grievance procedure and settlement and the testimony of the Union Secretary about securing authorization for arbitration. In his conclusions of law, adopted verbatim from the Union's proposals, the trial judge held, inter alia (23a-27a):

a. plaintiff failed to prove that the Union breached its duty of fair representation owed to him because he failed to prove that the decision to take the grievance to arbitration was reached in a discriminatory, dishonest, arbitrary or perfunctory fashion;

b. plaintiff failed to prove that his rights under the collective bargaining agreement were violated by the settlement;

c. that the failure of the

Union to invite plaintiff to participate in the arbitration is not sufficient to establish a breach of fair representation since there is no proof that the result of the arbitration would have been different had he participated;

d. plaintiff failed to prove that resort to the contractual grievance procedure would have been futile.

REASONS FOR GRANTING THE WRIT.

I.

The decision below, upholding the Union's right to settle a grievance involving members' conflicting claims for an employment position, without providing notice, representation, or opportunity to be heard to the member ousted by the settlement, is in conflict with the decision of another court of appeals and is an important issue which requires definitive clarification by this Court.

Humphrey v. Moore, 375 U.S. 335 (1964), appears to imply that when a union takes sides in the arbitration of a

grievance whose outcome would impair some of its members' rights, that it must provide notice, representation and opportunity to be heard to the members whose position it opposes. That case involved the purchase of one company by another, where the same union represented the employees of both companies. A grievance arose out of the integration of the seniority lists of the two companies. The union took a position in the arbitration which was adverse to the employees of the company being acquired since it would result in substantial layoffs from its work force. This court upheld the union's taking sides. However, this court specifically noted that the adversely affected employee group was given notice of the hearing and provided with representation by the union and

given every opportunity to state their position (375 U.S. 350).

Here, to the contrary, Petitioner was provided no notice ot the planned arbitration, no opportunity to participate, and no representation. Worse, the arbitration did not take place, since the Union and the Company entered into a settlement ousting Petitioner from his job without any discussion with the Petitioner. If the arbitration had taken place, the Petitioner might have been afforded some safeguards, even in his absence, by an arbitrator who might independently review the situation and who likely would have adjourned the proceedings demanding that the real party in interest be provided with representation and other procedural safeguards.

Petitioner has not located any decision where this court directly addressed the issue of the union's duty to provide representation where members' rights are in conflict and the union supports one side in the grievance proceeding. It is a far-reaching and important issue that this court should address.

Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980 en banc), is similar. That case also involved a promotion provision which made seniority only one of a number of factors to be considered. The company selected a number of junior applicants for job openings and the union supported the grievances of senior applicants without making a comparative evaluation of the respective qualifications of the

contenders for the position. The union and the company then proceeded to arbitrate the grievances without providing opportunity to participate in the arbitration to the persons selected for the employment positions at issue. The court sustained the jury determination that the union breached its duty of fair representation under the circumstances.

II.

Upholding the Union's authorization of arbitration, without considering the comparative qualifications of the candidates for the position, where seniority was only one factor in the promotion decision, conflicts with the decision of another court of appeals.

Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Gelco Corp., 584 F. Supp.514 (E.D. Miss. 1984), aff'd, 758 F.2d 1272 (8th Cir. 1985), is similar but less egregious.

There, the union sued to compel the company to arbitrate the grievance of the senior applicant about his non-selection for the job. The promotion provision made seniority only one of the factors to be considered. The union member selected for the job intervened in the action and the district court granted summary judgment and found the union breached its duty of fair representative in failing to consider the comparative qualifications of the grievant and the person selected before it authorized arbitration. The trial court said (584 F. Supp. 516):

> "Finally, the union's admission that the union did not at any time consider the relative qualifications of Brown and Muehlrath, further convinces this Court that the union's consideration of seniority was arbitrary. Therefore, the union breached its duty of fair representation as a matter of law."

In affirming, the court of appeals rejected the union's argument that the case was not ripe because the arbitration had not taken place and because the union meant to offer the person selected substantial procedural safeguards in the arbitration process. The court held that the breach of duty occurred in the union's decision to take the grievance to arbitration and in the manner in which the decision was made (758 F.2d 1275):

> "The district court correctly pointed out that the Union's ripeness argument missed the entire thrust of Muehlrath's position. Muehlrath's argument is that it was the Union's decision to take Brown's grievance to arbitration and the manner in which that decision was made which constituted the breach. This breach could not possibly be cured by providing Muehlrath with procedural protection in the future (emphasis in original)."

But, here, the union was prepared to arbitrate the senior employee's grievance without providing any notice to plaintiff or any procedural safeguards. The union then settled the grievance by sending Petitioner back to the mailroom without notice, opportunity to participate, or representation.

Belanger v. Matteson, 346 A.2d 124 (R.I. 1975), is similar. That case involved a promotion provision where seniority was to prevail if the comparitive qualifications of the candidates were equal. The employer selected the junior applicant and the senior applicant was supported by the union in the arbitration because of his seniority. The Rhode Island supreme court held that the union breached is duty of fair representation in supporting

the senior applicant without considering the comparative qualifications of the contenders for the position, required by the collective bargaining agreement. The court said (346 A.d 131-132):

> "Where the union and the employer have provided by contract for the internal settlement of disputes by means of grievance and arbitration procedures, and where these settlement procedures can be initiated and continued solely by the union, the union is likewise subject to a duty of fair representation in its handling of employee grievances. As in contract negotiations, the union as it deals with grievances must often take a position which is detrimental to some employees as it is helpful to others. The duty upon the Union here is to '*** in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances.' Vaca v. Sipes, 386 U.S. 171, 194, 87 S.Ct. 903, 919, 17 L.Ed.2d 842, 860 (1967), and if it decides to pursue a grievance, it must not do so in a perfunctory manner.

"Applying these standards of conduct to the facts of this case, we are faced with a clear breach by the Union of the duty it owed to Belanger. The testimony was undisputed, and the trial justice found that throughout the grievance procedure, the Union and its representatives acted without ever contacting Belanger or considering his qualifications for the position. The Union aligned itself with Matteson in seeking Belanger's removal; and at the arbitration hearing the union representatives attempted to demonstrate that Matteson, rather than Belanger, was entitled to the position.

"The Union admitted at trial that it had no knowledge of Belanger's qualifications for the contested position and he testified at the arbitration hearing, and that it never contacted Belanger to discuss the impending challenge.

"We have said a union may, and often must, take sides. But we wish to make it clear that it must act, when it does, in a nonarbitrary, nonperfunctory manner. Here the Union chose sides totally on the fortuitous circumstances of who the School Committee did not hire. It is true, in a very simplistic

> sense, that Matteson, being the only member of the bargaining unit with 'a grievance', is therefore the only individual in need of Union support. But one would require blinders to accept this view. It should have been apparent to the Union that Matteson's grievance, although theoretically against the School Committee, was in reality against Belanger. Any action the Union took on Matteson's behalf threatened Belanger's job.
>
> "The Union had as much of an obligation to support Belanger as it had to support Matteson until such time as it had examined the qualifications of both candidates, and it believed that the seniority clause would control the selection process."

III.

This Court should clarify the scope of Rule 52(a) where the trial court uncritically adopts proposed findings of fact and conclusions of law prepared by one party without judicial guidance.

In Anderson v. City of Bessemer, 470 U.S. 564 (1985), this court considered

the issue of whether Rule 52(a), F.R. Civ.P., applied where the district judge adopted the findings of fact and conclusions of law prepared by one of the parties. This court noted that in a number of previous cases it had criticized courts for their verbatim adoption of findings of fact prepared by a party, but that its previous discussions on the subject suggested that even when the trial judge adopts proposed findings of fact verbatim, the findings are those of the court and may be reversed only if clearly erroneous. This court said (470 U.S. 572):

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, e.g., United States v. El Paso Natural Gas Co., 376 U.S. 651,

656-657, 84 S.Ct. 1044, 1047-1048, 12 L.Ed.2d 12 (1964); United States v. marine Bancorporation, 418 U.S. 602, 615, n.13, 94 S.Ct. 2856, 2866, n.13, 41 L.Ed.2d 978 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, The Nonjury Trial--Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. United States v. Marine Bancorporation, supra, at 615, n.13, 94 S.Ct. at 2866, n.13; United States v. El Paso Natural Gas Co., supra, 376 U.S., at 656-657, 84 S.Ct., at 1047-1048.

In that case, this court reversed the Court of Appeals, which had made an

independent review of the record, because the trial judge had adopted verbatim the proposed findings of the prevailing party. However, this court noted that the district court did not appear to have uncritically accepted findings of fact prepared without judicial guidance by the prevailing party, since the court provided the framework for the proposed findings when it issued its preliminary memorandum which set forth its essential findings. Further, the crucial findings of the district court varied considerably in organization and content from those submitted by the party (470 U.S. 572).

The circumstances of Petioner's case establish the need for this court to delineate when the district court's adoption of proposed findings by a party are no longer insulated by Rule 52(a).

Here, most of Petitioner's evidence at bench trial consisted of about 300 pages of deposition testimony of the union officials involved in the grievance proceedings and settlement, which was admitteded into evidence because these persons were members of the union governing council. Most of these persons did not appear at trial where the union's case consisted of self-serving testimony by its vice-president and treasurer.

The union's proposed findings, adopted almost verbatim by the trial judge, did not make any reference to the about 300 pages of deposition testimony Petitioner introduced into evidence, which contained the admissions of the Union officials that they never compared the qualifications of Petitioner and the grievant and never considered Petitioner

during the grievance procedure and settlement and the testimony of the Union Secretary about the method of securing authorization for arbitration.

The uncritical adoption by the trial judge of the union's proposals is made clear by consideration of his conclusion of law number 6 (26a):

> "The mere failure of the Union to invite plaintiff to participate in the Germscheid arbitration is not sufficient to establish a breach of the duty of fair representation, since there is no proof that the result of the Germscheid arbitration would have been different had he participated."

But here, no arbitration took place. The grievance was settled by the Union and Company before the arbitration started.

Conclusion of law number 7, also adopted verbatim from the Union's submission, says that plaintiff "failed to prove that resort to the grievance

procedure would be futile".

But Petitioner's primary claim was that the Union breached its duty of fair representation in agreeing that he should be ousted from his job. Prevailing on this claim would void the Union-Company agreement and restore him to his job. The contractual grievance procedure had no provision for resolution of disputes between the Union and a member. It said:

> "1. Should differences arise between the Employer and the Union or between the Employer and any employee, there will be no suspension of work by the Union or lock-out by the Employer on account ofd such differences, but an earnest effort shall be made to settle such differences immediatly in the following manner [emphasis added]"

Further, the grievance procedure designated the Union to represent the grievant in the last step of the procedure which was binding arbitration.

Using the grievance procedure to

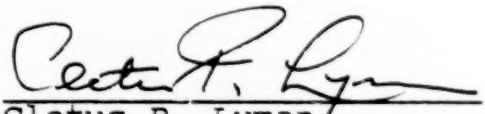
resolve a claim by a member of breach of duty by the union would mean that the hapless member would be relegated to the Union presenting the case against itself in binding arbitration.

It appears to Petitioner that he has received form without substance in a judicial process where the district judge repeats the proposed findings and conclusions of the opposing party without addressing cases on point supporting Petitioner or alluding to deposition testimony introduced by Petitioner containing damaging admissions of Union officials, and where the court of appeals affirms by judgement order entered without argument.

This court should delineate the scope of Rule 52a, F.R. Civ P., under the circumstances here, so that busy trial and appelate judges do not abdicate their responsibilities.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for certiorari should be granted.



Cletus P. Lyman
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

APPENDIX

IN THE UNITED STATES DISTRICT COURT
2FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JULIU WEBB	:	CIVIL ACTION
	:	
v.	:	
	:	
MERCK AND COMPANY, INC., et al.	:	NO. 87-7967

MEMORANDUM

R.F. Kelly, J. December 27, 1988

This is an action brought under the Labor Management Relations Act (LMRA), 29 U.S.C. †185 et seq. granting jurisdiction for suits concerning violations of labor contracts. Plaintiff, Julius Webb, is an employee of Merck and Company, a major pharmaceutical company. He was a member of the Merck, Sharp & Dohme Employees Organization (Union), which is the union representing clerical and office workers

at Merck's West Point, Pennsylvania facility.

The complaint against Merck and Company, Inc. (Merck) and the Union alleges a breach of the collective bargaining agreement by Merck, the employer, and a breach of the duty of fair representation by the Union. Plaintiff alleges that the defendant Merck violated the collective bargaining agreement with defendant Union when the parties entered into a settlement agreement on behalf of another employee which resulted in plaintiff's return to his former position as a mail room messenger. Plaintiff alleges that the Union violated its duty of fair representation owed to plaintiff by entering into this settlement on behalf of another employee. Plaintiff contends that such action by the

defendant Union discriminated against him because of his race.

Prior to trial, plaintiff and Merck entered into an agreement by which the claim against Merck was settled and under which plaintiff was promoted to a management level job, not subject to Union jurisdiction. As part of the settlement with Merck, plaintiff moved to serve an amended complaint eliminating Merck as a defendant in this case. On September 16, 1988, this Court granted plaintiff's motion to amend the complaint.

On September 16, 1988, this Court denied defendant's motion for summary judgment. In our Order, we identified as the issue of material fact for submission to fact finder the following: The issue that the jury must decide is whether, based on the evidence presented, the

Union's decision to pursue and settle the grievance of Mr. Germscheid constitutes negligence or amounts to arbitrary discriminatory or bad faith conduct.

The parties waived their right to a trial by jury and the matter was tried before the court. From that testimony, we make the following:

FINDINGS OF FACT

1. Merck is a manufacturer of pharmaceutical products and operates a facility at West Point, Pennsylvania, where plaintiff, Julius Webb, is employed (N.T. 14).

2. The Union is the recognized bargaining representative on behalf of all office, clerical employees and bindery workers employed by Merck at its facilities in West Point and Blue Bell, Pennsylvania (N.T. 60).

3. At all pertinent times involved in this case, the terms and conditions of employment affecting the employees represented by the Union, including the plaintiff, are set forth in a collective bargaining agreement between Merck and the Union dated May 16, 1984 (N.T. 59-60).

4. The collective bargaining agreement contains at Article III thereof a clear and unambiguous statement of the procedure to be utilized by Union members and the Union in connection with the resolution of disputes and grievances arising out of the employment situation, and covering any "differences" between the "Employer and the Union or between the Employer and any employee. . . ." (N.T. 30-32).

5. Pursuant to the grievance

procedure contained in the parties' collective bargaining agreement, any Union member can initiate a grievance either with, or without, the involvement of, or participation of a Union representative (N.T. 32).

6. Since in or about May, 1987, and for sometime prior thereto, the plaintiff was aware of the terms of the grievance procedure, and knew that he could initiate a grievance on his own without involving the Union (N.T. 32).

7. The Union has a grievance committee, whose members are appointed by the President.

8. The Union grievance committee becomes actively involved in a case at the third step of the grievance procedure. At that time, the grievance committee will meet with the grievant,

prior to the third-step meeting with the Company representatives, to prepare the Union's presentation at the meeting.

9. Members of the grievance committee attend the third-step meeting with the Company and present the grievance. Management people present the company's case. Later, the Company makes its response on the third-step. For at least the past six years, the Union has taken every case to arbitration when the grievant was not satisfied with the outcome of the third-step grievance meeting and requested that the Union pursue the matter to arbitration (N.T. 128).

10. In May, 1987, Merck posted a temporary vacancy in a cost-accounting clerk job for bid among its employees at the West Point facility. Among the

employees who submitted application for selection to the job were Julius Webb and Rowland Germscheid. At the time he posted his application for the cost-accounting clerk job, Webb held the position of messenger in the Employer's mailroom, the position which he held since his date of initial employment with Merck.

11. At the time that Webb submitted his application for the cost-accounting clerk job vacancy, he was aware that Rowland Germscheid, who he also knew had greater seniority than he, had also submitted a bid for selection to that job, along with other employees in the bargaining unit (N.T. 33).

12. The minimum qualifications for the cost-accounting clerk job which appear on the specification guide for the

position provide the following:

> Education Necessary - High School diploma or equivalent
>
> Desirable - One year of college with courses in accounting and/or finance
>
> Experience Necessary - Six months in detailed clerical position
>
> Desirable - Six months in an accounting environment.

13. On May 12, 1987, the Company posted a "Job Filled List" which announced Rowland Germscheid's selection to fill the vacancy in the cost-accounting clerk job at issue. Sometime thereafter, Germscheid was informed that his selection was rescinded (N.T. 52).

14. Upon notice from the Company that his selection had been rescinded, Germscheid requested that the Union file a grievance on his behalf protesting the personnel action involved. At that time, Germscheid was informed by then Union

Vice President, Michael Cavalier, that the Employer could cancel a job posting and/or selection without necessarily violating the contract; however, should the Employer elect to make another selection to the position in question that subsequent selection could trigger a meritorious grievance depending upon whom the Employer selected (N.T. 62).

15. On May 20, 1987, the Company posted a Job Filled List which disclosed that Julius Webb was selected to the cost-accounting clerk job in controversy (N.T. 63).

16. On or about May 20, 1987, Webb discussed with a Union official, Henry Robbins, the fact that he felt "funny" taking the job under the circumstances. Robbins advised Webb that if Germscheid filed a grievance, he would have a strong

case, but under the circumstances Webb should accept the job any way (N.T. 42; 120-121).

17. On that same date, Rowland Germscheid filed Grievance 87-02 which claimed that Merck violated his rights under the contract when it selected a junior employee to fill the cost-accounting clerk job (N.T. 64).

18. Webb was aware that Germscheid filed a grievance challenging the Employer's rescission of his selection to the cost-accounting clerk's position shortly after Webb was selected for that job (N.T. 39-40).

19. Webb understood the purpose of Germscheid's grievance, and that if it were successful it would affect Webb's continued tenure in the cost-accounting clerk job, yet Webb took no action to

question the Union about the Germscheid grievance or its status at anytime (N.T. 40; 46-47).

20. Webb acknowledges that Germscheid, as a member of the Union, had a right to grieve the Employer's rescission of his selection to the cost-accounting clerk job (N.T. 48).

21. During the grievance procedure in the Rowland Germscheid grievance, the Union discovered that the Employer representatives involved believed that neither Mr. Germscheid nor Mr. Webb met the qualifications established by Merck for selection to the cost-accounting clerk job. During the grievance procedure, the Union learned that Mr. Germscheid was disqualified by the Employer on the basis tat he did not have six months experience as a cost-accountant (N.T. 68; 72-75;

122-123).

23. Michael Cavalier, Chairman of the Grievance Committee and then Vice-President of the Union, and Henry Robbins, then Treasurer of the Union, who also was a member of the Grievance Committee, believed that both Messrs. Germscheid and Webb met the qualifications for the job as set forth in the specification guide promulgated by Merck for the job, and that the Employer's interpretation of the qualifications was incorrect (N.T. 73; 77; 122-123).

23. The collective bargaining agreement provides, in clear and unambiguous terms, inter alia, that promotions to jobs such as cost-accounting clerk jobs will be made "on the basis of the applicant's qualifications for a given job. Such qualifica-

tions are defined as Union seniority, all elements of the job description, and all elements of the specification guide. . . .

24. Mr. Germscheid's grievance proceeded through the three steps of the grievance procedure set forth in the collective bargaining agreement and it was denied by the Company at each step. The Union then gave notice that it was proceeding to arbitration with Mr. Germscheid's grievance (N.T. 68-75).

25. Before deciding to pursue the Germscheid case to arbitration, the Union Grievance Committee first reviewed the facts, including the Company's answers and explanations as to why it rescinded Germscheid's selection to the job in question, reviewed the promotion clause of the 1984 collective bargaining

agreement, and after consultation with its counsel, elected to pursue the case to arbitration because it believed that Germscheid's grievance was meritorious (N.T. 76-78; 80).

26. Among the factors that the Union Grievance Committee considered significant in its evaluation of the Germscheid grievance was the fact that Merck had actually selected Germscheid to the job and officially announced his selection before reversing its decision. Such circumstances were unique in the Union's experience (N.T. 77; 119).

27. The Union Grievance Committee was aware that the contract clause governing promotions required the Employer to make its selection on the basis of applicants' qualifications, which included seniority as one of the

criteria, along with the requirements for the job as detailed in the job description and specification guide (N.T. 113; 136).

28. Both Michael Cavalier and Henry Robbins, who participated in the Union Grievance Committee's evaluation of the Germscheid case, were aware throughout the entire grievance process that the contract did not require the Employer to select the senior applicant who merely met the minimum requirements in the specification guide for a job (N.T. 113; 139).

29. Both Michael Cavalier and Henry Robbins, based on the information provided to the Union during the Germscheid grievance, believed that Germscheid and Webb satisfied the requirements established by Merck for the cost-accounting

clerk job and that the Employer's assessment of their respective qualifications was incorrect (N.T. 79; 1215).

30. Both Michael Cavalier and Henry Robbins recommended that the Germscheid grievance proceed to arbitration, notwithstanding their determination that Webb met the qualifications established in the job description, because Germscheid was seven (7) years senior to Webb, and as the most senior qualified applicant should have been given an opportunity to fill the vacancy (N.T. 88; 1215-126; 139).

31. Neither Webb's or Germscheid's race, nor the Unior officers' past acquaintanceship with eitner man, had any bearing whatsoever on the Union's decision to recommend arbitration of the Germscheid grievance (N.T. 78-79; 127).

32. The Germscheid arbitration was scheduled to be heard on September 16, 1987. On that day, before going through with the hearing, Merck and the Union entered into a settlement agreement of the Germscheid grievance, which provided, inter alia, that Germscheid would be accepted into the cost-accounting clerk job, and upon his successful completion of a 45-day probationary period, plaintiff would be returned to his former position (N.T. 82; 151).

33. Glenn Guior, Esquire, a labor attorney for Merck and Company, reviewed the Germscheid grievance prior to the arbitration hearing and recommended that Merck settle the case because he believed the Employer violated Mr. Germscheid's rights under the contract when it rescinded his selection to the cost-

accounting clerk job and selected the junior employee, Julius Webb. It was Guior's opinion that if the case were pursued before an impartial arbitrator, Merck would lose the arbitration (N.T. 146-149).

34. Guior informed the Union's representatives involved of his assessment of the Germscheid case before the parties entered into the settlement agreement in controversy; the Union never approached the Employer to propose settlement of the case (N.T. 82-84; 151-152).

35. The Germscheid arbitration was a matter of common knowledge in the department within which Messrs. Webb and Cavalier both happened to work (N.T. 90).

36. The day after the Germscheid settlement agreement was reached, Michael

Cavalier met with Julius Webb and informed him of the terms of the Germscheid settlement, and of the impact that the settlement would have on Webb if Rowland Germscheid successfully completed the 45-day probationary period provided for in the agreement (N.T. 84-85).

37. During the conversation in which Cavalier advised Webb of the Germscheid settlement, Julius Webb asked if he could file a grievance challenging his probable removal from the cost-accounting clerk's position; Cavalier informed Webb that he could, in fact, file such a grievance if he believed his contract rights had been violated (N.T. 24; 84-86).

38. Mr. Germscheid successfully completed his probationary period and Mr. Webb was returned to the mailroom in

December, 1987.

39. Julius Webb never requested that the Union file a grievance on his behalf, or take any action whatsoever concerning his removal from the cost-accounting clerk's job upon satisfaction of the Germscheid settlement agreement, or for any other purpose upon which he believed his rights under the contract had been violated by the Company (N.T. 42; 86).

40. The Union never refused to take any action on Julius Webb's behalf in any matter (N.T. 127-128).

41. Although Webb believed that his rights under the contract had been violated when he was informed of the Germscheid settlement, Webb did not file a grievance because he did not have confidence in the Union. Instead, Webb

hired a lawyer presumably to either make his own "deal" with the Employer or to sue the Union and Merck (N.T. 25).

42. Webb did not believe the Union represented him fairly, "[B]ecause they took sides to Mr. Germscheid in representing him and they didn't represent me" (N.T. 25).

43. Neither Julius Webb nor his counsel ever informed the Union of any of its direct communications with the Employer regarding the Germscheid settlement, or of Webb's claims against the Company and the Union resulting from the Germscheid settlement at anytime prior to filling the instant lawsuit.

CONCLUSIONS OF LAW

1. The plaintiff has failed to prove that the Union's decision to take the Rowland Germscheid grievance to

arbitration was reached in a discriminatory, dishonest, arbitrary or perfunctory fashion; therefore, plaintiff has failed to provide that the Union has breached the duty of fair representation owed to him. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983); Vaca v. Sipes, 386 U.S. 11, 190-191 (1967).

2. Plaintiff has failed to prove that his rights under the collective bargaining agreement have been violated, either in connection with the Germscheid settlement, or any other matter related to the Employer's final decision to select Rowland Germscheid to the cost-accounting clerk's position in dispute; therefore, in the absence of a breach of contract, plaintiff has failed to establish the necessary prerequisites for

a DFR claim. Section 301 Labor-Management Relations Act, 28 U.S.C.A. †185(a).

3. The Union's exercise of its discretion to process the Rowland Germscheid grievance and ultimately settle it was appropriate under all the facts and circumstances involved and was not reached in bad faith and did not constitute a breach of the duty of fair representation owed to the plaintiff, even though it resulted in the plaintiff's return to his former position as a mailroom messenger. Gloclowski v. Penn Central Transportation Co., 545 F. Supp. 327, 347 (W.D. Pa. 1982), aff'd 707 F.2d 1401; Ford Motor Company v. Huffman, 345 U.S. 330 (1953).

4. The Union's decision, to both pursue and settle the Rowland Germscheid

job selection arbitration, was reached in complete good faith and honesty and was well-informed, taking into consideration the merits of the claims in terms of the language of the contract involved in light of the Employer's admission that it violated Germscheid's rights under the contract when it rescinded his selection and put the plaintiff in the job at issue. Cf. Automotive Petroleum & Allied Ind. v. Gelco Corp., 584 F. Supp. 514 (E.D. Mo. 1984).

5. The Union did not breach its duty of fair representation by taking a position in a seniority dispute in good faith and without hostility or arbitrary discrimination. Greismann v. Chemical Leaman Tank Lines, Inc., 776 F.2d 66, 74 (3d Cir. 1985), citing Humphrey v. Moore, 375 U.S. 335, 375, 84 S.Ct. 363, 11 L.Ed.

370 (1964).

6. The mere failure of the Union to invite plaintiff to participate in the Germscheid arbitration is not sufficient to establish a breach of the duty of fair representation, since there is no proof that the result of the Germscheid arbitration would have been different had he participated. See, Dissent of Circuit Judge Heany in Smith v. Hussman Refrig. Co., 619 F.2d 1229, 1253 (8th Cir. 1980), citing Deboles v. Transworld Airlines, Inc., 552 F.2d 1005 (3d Cir., 197).

7. Plaintiff has failed to prove that resort to the contractual grievance procedure would have been futile. Aiello v. Apex Marine Corp., 610 F. Supp. 12155, 1266 (D.C. Pa. 1985).

8. Plaintiff cannot excuse his failure to pursue remedies under the

grievance procedure by alleging that the Union should have taken action on his behalf without specifically asked to do so. Leury v. U.G.I. and Local No. 1941, 451 F. Supp. 278, 279, 280 (M.D. Pa. 1978).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1338

JULIUS WEBB,
Appellant

v.

MERCK & CO., INC. and MERCK,
SHARP & DOHME EMPLOYEES ORGANIZATION

Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D.C. Civil Action No. 87-7967)
District Judge: Hon. Robert F. Kelly

Submitted Under Third Circuit Rule 12(6)
September 6, 1989

Before: MANSMANN, NYGAARD and ALDISERT,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is

hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT:

Attest: /S/ R. Aldisert
Circuit Judge

/S/ M. Elizabeth Ferguson
Chief Deputy Clerk

September 11, 1989

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(D.C. Civil Action No. 87-7967)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD & ALDISERT,* Circuit Judges.

The petition for rehearing filed by appellant, Julius Webb, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not have voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ R. Aldisert
Circuit Judge

DATED: Oct. 3, 1989
*As To Panel Rehearing Only.